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VIA CM/ECF

Molly Dwyer
Clerk of the Court
Office of the Clerk
United States Court of Appeals
For the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *Countrywide Financial Corp. v. National Labor Relations Board*,
U.S. Court of Appeals for the Ninth Circuit, Case Nos. 15-72700 and 15-73222;
National Labor Relations Board Case Nos. 31-CA-072916 and 31-CA-072917

Dear Ms. Dwyer:

In its September 20 letter, the NLRB mischaracterizes this Court's decision in *Morris v. Ernst & Young*, No. 13-16599 (9th Cir. Aug. 22, 2016), and its impact on the instant matter. Contrary to the NLRB's assertions, this Court did **not** "adopt[] the *Murphy Oil* rule." Rather, instead of discussing class or collective action waivers, the Court limited its findings to the particulars of the total "concerted action waiver" set forth in Ernst & Young's challenged arbitration agreement. Specifically, the panel held that the agreement's "'separate proceedings' clause" was unenforceable, since it "prevents the initiation of concerted legal action anywhere" (*e.g.*, two employees could not proceed together in any forum) and, thereby, unlawfully interferes with "a protected § 7 right in violation of § 8." *Id.* at 13-14.

The panel explained that "[t]he NLRA establishes a core right to concerted activity. Irrespective of the forum in which disputes are resolved, employees must be able to act in the forum *together*. The structure of the Ernst & Young contract prevents that. Arbitration, like any other forum for resolving disputes, cannot be structured so as to exclude all concerted employee legal claims." *Id.* at 26 (emphasis in original).

The situation here is very different. The Arbitration Agreement at issue does not contain a "concerted action waiver" provision or "separate proceedings clause" like the one in the Ernst & Young contract. Rather, it is "silent" as to class and collective actions and does not have an express waiver like any of the other cases. Moreover, unlike *Morris*, here, two employees actually did act *in concert* when they collectively pursued their claims *together* in two different forums—court and arbitration—and, ultimately, *together* reached a settlement on a class-wide basis. Consequently, neither *Morris* nor any of the other decisions are directly on point. Based

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on the facts and precedent in Petitioners' previously-filed briefs, it is clear (notwithstanding any of the subsequent decisions) that Petitioners did not violate the NLRA and the Court should reject any argument to the contrary.

Sincerely,

/s/ Gregg A. Fisch
Gregg A. Fisch
for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

cc: All Counsel (via CM/ECF)

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